United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

SUPPLEMENTAL JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,195

RONALD L. WALUTES, Trustee, etc.
and WASHINGTON CONCRETE SALES
CORPORATION, a corporation

Appellants,

v.

ARTHUR E. MORRISSETTE,
and
CLARA M. MORRISSETTE

Appellees.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,195

RONALD L. WALUTES, Trustee, etc.
and WASHINGTON CONCRETE SALES
CORPORATION, a corporation

Appellants,

v.

ARTHUR E. MORRISSETTE,
and
CLARA M. MORRISSETTE

Appellees.

Appeal from the United States District Court
for the District of Columbia

SUPPLEMENTAL JOINT APPENDIX

INDEX

SUPPLEMENTAL JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RONALD L. WALUTES, Trustee of the Estate of Alexandria Iron Works, Inc., A Bankrupt Plaintiff, v. ARTHUR E. MORRISSETTE, et al Defendants.	)	CIVIL ACTION NO. 3333-56

DOCKET ENTRIES

* * * * *

Proceedings

1965

Apr. 26	Stipulation and Order re submission of case on briefs. (N) Corcoran, J.
Oct. 26	Findings of fact and conclusions of law. (N) Exhibit "A" Corcoran, J.
Oct. 26	Order dismissing complaint of pltf and cross-claim of deft Washington Concrete Sales Corporation. (N) Corcoran, J.
Nov. 3	Proposed Findings of Fact and Conclusions of Law by Washington Concrete Sales Corporation, Inc., P&A's filed
Nov. 24	Notice of appeal by deft Concrete Sales Corp., Inc., from order of 10/26/65. Copies mailed to K. K. Spriggs and Donald S. Caruthers. Deposit $5.00 by Sweeney. filed
Nov. 24	Notice of appeal by pltfs from order 10/26/65. Copies to Mr. Spriggs and Mr. Sweeney, $5.00 deposit by D. Caruthers. filed

1965

Nov. 24	Cost bond on appeal by pltfs in sum of $250.00 with USF & G Co., approved and filed
Dec. 6	Cost bond on appeal of deft with Hartford Accident and Indemnity Co., in sum of $250.00, approved. (fiat) McGarraghy, J.
Dec. 13	Transcript of proceedings May 24, 1963; pp 1 - 88. (Rep: E. A. Kaufman) Clerk's Copy. filed
Dec. 29	Transcript of proceedings May 24, 1963 - Vol: Motion: page 1 to 88, inclusive. (Rep: Alfred Kaufman) (Attorney's copy) filed
Dec. 29	Transcript of proceedings, Dec. 9, 1963 - pages 1 to 20, inclusive. (Rep: Harry Kaitz) (Court's copy). filed
Dec. 29	Transcript of proceedings, Dec. 9, 1963 - pages 1 to 20, inclusive; (Rep: Harry Kaitz) (Attorney's Court's copy)filed
Dec. 30	Transcripts (13) of proceedings before the Auditor. filed

1966

Jan. 3	Record on Appeal delivered to USCA; Deposit by Paul Lee Sweeny $3.05.
Jan. 3	Receipt from USCA for Original papers. filed

1967

Jan. 25	Certified copy of judgment of U.S.C.A. affirming judgment of U.S.D.C.; appellees to recover costs; copy of opinion attached. filed
Feb. 20	Bill of costs as taxed by Clerk, U.S.C.A., in amount of $247.81. filed
Mar. 17	Return from USCA of original record including transcripts (4), 13 Volumes of transcripts before the Auditor and 4 envelopes of exhibits. filed
Mar. 16	Motion of defts for assessment of costs; P&A; affidavit; c/m 3-15-67; MC filed
Mar. 23	Opposition of deft. #16 to motion of deft. #1 for assessment of costs; c/m 3/23/67. filed
Mar. 31	Additional memorandum in support of motion of deft Morrissette for assessment of costs; P&A; c/m 3/31/67. filed

1967

Apr. 11	Answer of pltf to motion for assessment of costs; c/m 4-10; P&A. filed
Apr. 17	Receipt of Donald S. Caruthers for transcript and exhibits. filed
Apr. 19	Reply and acknowledgment of error by defts; P & A filed
May 8	Proposed Order taxing costs of deft and cross-claimant Washington Concrete Sales Corporation denied. (fiat) (N) McGarraghy, J.
May 8	Order awarding defts Arthur E. Morrissette and Clara M. Morrissett $1,438.38 as usuable costs vs. Plaintiff and the Cross-Claimant. (N) McGarraghy, J.
May 11	Exhibit of Washington Concrete Sales Corp. filed
May 18	Motion of pltf Walutes and deft Washington Concrete Sales Corp. to vacate or amend order to vacate, alter or amend judgment of 5-8-67; c/m 5-17; P&A; M.C. filed
May 26	Opposition of defts #1 & #2 to motion of pltff and deft #10 to vacate alter or amend order of May 8, 1967; P&A; c/m 5/25. filed
May 26	Order denying motion of pltf Walutes, Trustee, and deft and cross claimant Washington Concrete Sales Corporation to vacate; alter or amend Order of May 8, 1967. (N) McGarraghy, J.
May 31	Reply of pltfs. to opposition of defts., Morrisette to motion to vacate, alter or amend order of 5-8-67; c/m 5-29-67. filed
June 13	Order granting judgment of $938.38 in favor of Auditor of this court vs. Arthur E. and Clara M. Morrissette; judgment in favor of the Auditor vs. Ronald Walutes, Trustee of the Estate of Alexandria Iron Works, Inc., a bankrupt for $647.48; judgment in favor of the Auditor vs. Washington Concrete Sales Corporation for $290.89 (N) Micro 6-14-67. McGarraghy, J.
June 26	Notice of appeal of Ronald L. Walutes, trustee, from order of May 8, 1967; deposit by Sweeney $5.00 (copies mailed to Milton M. Burka & Kahl K. Spriggs) filed
Aug. 4	Record on Appeal delivered to USCA; Deposit by Donald S. Caruthers $2.60.
Aug. 4	Receipt from USCA for Original Record. filed
August 7	Cost bond on appeal of pltf in amount of $250.00 with USF & G Co. approved. (fiat) Waddy, J.

[Filed March 16, 1967]

MOTION FOR ASSESSMENT OF COSTS

Come now the defendants, Arthur E. Morrissette and Clara M. Morrissette, and respectfully move the Court for an Order assessing as part of the taxable costs against the plaintiff, Ronald R. Walutes, Trustee of the Estate of Alexandria Iron Works, Inc., a bankrupt, and the cross-claimant, Washington Concrete Sales Corp., Inc., the sum of Five Hundred ($500.00) Dollars paid by the defendants, Morrissette, to the Auditor of this Court, in the above-entitled case as well as the additional sum of $938.38 requested by the Auditor from the plaintiffs and in support thereof state as follows:

1. This case was filed in 1956 to enforce a mechanic's lien against the defendants, Morrissette, joining as additional party defendants numerous other sub-contractors and materialmen, among whom was the cross-claimant, Washington Concrete Sales Corp., Inc., a corporation. Washington Concrete Sales Corp., Inc., hereinfurther referred to as Washington Concrete, filed a cross-claim against the defendants, Morrissette, joining with the plaintiff in this action against said defendants, Morrissette, to enforce its mechanic's lien.

2. While neither the plaintiff nor the cross-plaintiff had a just claim against the defendants, Morrissette, as was eventually determined by this Court and confirmed by the Circuit Court of Appeals for the District of Columbia Circuit, the defendants, Morrissette, owners of the property, were caused to incur extensive losses and expenditures including legal fees, costs, tremendous loss of time and other financial limitations brought about by the placing and keeping of the aforementioned liens against the property over a period of many years. Among the direct expenses incurred by them was an assessment of Five Hundred ($500.00) Dollars which they were required to pay in cash to the order of the Auditor of this Court and they have recently received an additional demand from the Auditor for the sum of $938.38 Nine Hundred and Thirty-Eight Dollars and Thirty-Eight Cents.

3. The defendants, Morrissette, had suffered extreme hardship and losses through the conduct of the general contractor who had been engaged to build their building against which the aforementioned mechanic's liens were filed. The plaintiff and cross-plaintiff whose rights, if any, accrued from their dealings with the general contractor solely, have tenaciously and wrongfully pursued these defendants for a period of more than ten years and caused the defendants to incur losses in addition to their other losses which they should not have been forced to incur.

WHEREFORE, the defendants, Morrissette, respectfully pray the Court for an order fixing the sum of Five Hundred ($500.00) Dollars paid by them to the Auditor of this Court, as part of the taxable costs which they are entitled to recover against both parties, jointly and severally.

/s/ Milton M. Burke
Attorney for Defendants,
Morrissette

POINTS AND AUTHORITIES

Rule 54 (d)

General Powers of this Court

Affidavit of Arthur E. Morrissette

/s/ Milton M. Burke
Attorney for Defendants,
Morrissette

[Filed March 23, 1967]

WASHINGTON CONCRETE SALES CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS MORRISSETTE'S MOTION FOR ASSESSMENT OF COSTS

Comes now the defendant Washington Concrete Sales Corporation and says that the motion of the defendants Morrissette to "assess" Five Hundred Dollars as costs against this defendant ought not to be granted for the following reasons, inter alia:

1. This case has now gone to final judgment after some ten years litigation and neither the judgment of this Court nor that of the Court of Appeals has awarded the defendants the sum they seek. It is now too late to reopen the judgment of this court in order to award defendants any further amounts herein. What said defendants are really asking this Court to do is to award them damages ex post facto, when the original judgment of this Court did not do so. No appeal was taken by said defendants from the final judgment of this Court and the same has now become final, and cannot now be reopened in order to award said defendants damages which they did not ask for in their pleadings and which were not awarded to them when the said judgment was rendered.

2. This Court lacks the power to tax the sum requested as costs in this case now that the litigation is ended, there being no prior order providing for the same. Title 28, Sections 1920 and 1921 of the United States Code Annotated, and Title 11, Sections 15-701 to 15-716 inclusive, of the District of Columbia Code of 1961 (now Sections 15-701 to 15-716, 1966 Supplement to D.C. Code of 1961) set forth all of the matters that can be lawfully taxed as costs, and no mention is made in either of said statutes of auditor's fees or expenses. There is therefore no statutory authority permitting the taxing of auditor's fees or expenses as costs. And the refusal of the Clerk of this Court to tax the sum sought by said defendants as costs in this case amply demonstrates that it is not the custom to tax the same as costs in this jurisdiction.

3. The awarding of fees and expenses incurred during hearings before the auditor is discretionary in the first instance and that discretion was never exercised in defendants' favor in this case at any time prior to final judgment. The customary practice in this jurisdiction, laid down in Tendler v. Jaffee, 92 U.S. App. D.C. 2,5, is to order such fees and expenses divided between the litigants, regardless of the ultimate outcome of the case and that is the effect of what was done in this case. For the same holding, as Tendler v. Jaffee, see U.S. v. E.J. Biggs Construction Co., (7 Cir. 1940) 116 F. 2d 768, 775. The non-prevailing parties in this case have already paid $975.00 of the auditor's fees and expenses, which is nearly twice the sum advanced by said defendants. When judgment was rendered in this case it did not include any of the expenses of the reference, and, as stated, said defendants took no appeal from said judgment which is now final. If said defendants were not satisfied with the judgment which was rendered by this Court they should have appealed the same insofar as it failed to award them the sum they now seek to charge against this defendant, so that all matters in issue could have been settled by one appeal. Since said defendants have acquiesced in the judgment of this Court and failed to take any appeal from the same, they are bound by the judgment which did not award them any of the fees or expenses incurred before the auditor.

4. Defendants Morrissette made no claim in their pleadings filed herein for any relief against this defendant, and there is therefore no basis in the pleadings for awarding said defendants any sums against this defendant.

5. Nowhere in the costs statutes, Title 28, Sections 1920 and 1921 of the United States Code Annotated, and Title 11, Sections 1501-1521, inclusive, of the District of Columbia Code of 1961 (now Sections 15-701 to 15-716, 1966 Supplement to the D.C. Code of 1961), is there any mention of auditor's fees or expenses as being considered taxable costs in a case. And since such fees and expenses are not taxable costs under the aforesaid controlling statutes, the party seeking to charge the same against his

adversary is required to apply to the Court in advance of trial for an order approving the same before they are incurred, and in the absdnce of such an order, they cannot be taxed against the opposing parties. Euler v. Waller, (C.A. N.M. 1961) 295 F.2d 765, 97 A.L.R. 2d 135; Brookside Theatre Corp. v. Twentieth Century Fox Film Corp., (D.C. Mo. 1951), 11 F.R.D. 259. No application having been made to the Court to approve the same before said fees and expenses were incurred, it is now too late to "assess" the same against this defendant.

6. In Adlung, Executor v. Gotthardt, et al., 103 U.S. App. D.C. 195, 257 F.2d 199, the executor of a decedent's estate sought to assess the commissions of a court appointed collector against the opposing party, the unsuccessful caveator of the decedent's will, as part of the collectible costs in the will contest suit. This Court denied the executor's motion and the Court of Appeals affirmed, saying (p. 196 of 103 U.S. App. D.C.):

> ". . . The executor has pointed to no statute which clearly supports his position. D.C. Code Sec. 11-518 (1951) on which he principally relies, appears to us to give him little or no help. . . It may well be doubted that the District Court had power to make the award requested by the executor, see D.C. Code Section 11-1501, 11-1503 (1951), at least in the absence of fraud or unconscionable conduct on the part of the caveators . . ." (underscoring mine).

If the District Court did not have the power to assess the commissions of a court appointed collector against the unsuccessful litigant as part of the collectible costs, as this Court said it did not have, and as the Court of Appeals reiterated it did not have, it would certainly seem to follow that this Court does not have the power, at this stage of this proceeding, to assess any part of the auditor's fees and expenses against this defendant as part of the collectible costs in this case.

Defendants Morrissette, having obtained all of the cinder block used in the construction of their cinder block warehouse from this defendant without paying for any of the same, now seek, in addition to their pound of flesh, the last drop of blood from this defendant, without demonstrating any legal right to the same.

WHEREFORE, defendant Washington Concrete Sales Corporation prays that the motion of the defendants Morrissette be denied, and that defendant Washington Concrete Sales Corporation be awarded reasonable attorney's fee for defending against the same motion.

/s/ PAUL LEE SWEENY
Attorney for Defendant
Washington Concrete Sales Corporation

* * *

[Certificate of Service]

[Filed April 11, 1967]

ANSWER TO MOTION FOR ASSESSMENT OF COSTS

Comes now the plaintiff, Ronald L. Walutes, Trustee, and in answer to the defendants' Motion for Assessment of Costs, and Additional memorandum in Support of the Motion of Defendants, Morrissette, for Assessment of Costs, respectfully moves this Honorable Court to dismiss said motion, for the following reasons:

1. The defendants have had more than ample time and opportunity to litigate their claim for costs and have wilfully and deliberately refused to do so. Charges of $500.00 were assessed against Defendants by the Deputy Auditor on January 29, 1962, and additional charges of $938.38 were assessed on January 18, 1963. Since that time the case has gone through numerous pre-trial and summary judgment procedures; the case was submitted for trial on the record on April 26, 1965, and decided by the Trial Court, Judge Corcoran, on October 26, 1965; appeal was taken to the

United States Court of Appeals for the District of Columbia Circuit and written and oral argument was presented by all counsel; and the appeal was decided. During all the aforementioned proceedings, defendants never once prayed the Court to award the $500.00 or the $938.38 assessment against the plaintiff as costs. They have therefore waived their right to do so.

2. In his "Additional Memorandu, etc." counsel for defendants makes a manifest missstatement of fact, as follows:

> 2. It was impossible for the Morrissettes to pray for allowance of the major portion of this assessment of costs earlier.
>
> Defendants Morrissettee, through their attorney, Milton M. Burke, received a letter from the Auditor of this Court, dated March 14, 1967, advising them of a charge of $938.38 and requesting payment thereof. [Photocopy attached]
>
> Prior to this date there had not been any suggestion that costs were outstanding.
>
> Therefore there has been no prior opportunity to pray for assessment of these costs. Nor had there been any suggestions, at the time this case was originally litigated, that this matter would require such extensive services of the Auditor of the Court. Consequently, the present prayer for assessment of current Auditor's fees as costs against Washington Concrete Sales is not only timely, but would have been impossible to bring before this date.
>
> This document is signed by Milton M. Burke.

If it were true that the defendants had received no prior notice of these charges, this might provide a basis for reopening this case at this point. In truth, however, the defendants, including their attorney, Milton M. Burke, have known of the $500.00 assessment for over five years, and of the $938.38 assessment for over four years. The $500.00 deposit was levied by the Deputy Auditor on January 29, 1962. In his report, filed January 18, 1963, the Deputy Auditor (1) set forth that the

defendants' deposit of $500.00 had been applied to stenographic costs, and (2) made an additional charge of $938.38 against the defendants Morrissettee. (The plaintiff and cross-claimant received an identical charge.) It can be presumed that counsel read the report, not only because it became the basis of subsequent litigation, but additionally, because he filed objections to it. In his objections to the Deputy Auditor's report, filed February 20, 1963, counsel for defendants, specifically referred to the $938.38 charge of the Deputy Auditor. These objections were signed by Milton M. Burke, the same attorney who now states in a pleading to this Court that it was impossible to pray for these costs earlier, because: "Prior to this date [March 14, 1967] there had not been any suggestion that costs were outstanding." Defendants and their attorney were thus fully aware of these charges "at the time this case was originally litigated" before the Trial Court in April, 1965, and made a conscious election not to pray for their taxation as costs.

3. The only authority cited by counsel for defendants to support the Court's power to reopen the case at this time to hear an issue not presented by defendants previously is, "General Powers of the Court." This unusual citation ignores the fact that Rules 59(e) and 60(b), Fed. R. Civ. P., 28 U.S.C.A., set forth the periods of time and conditions under which the Court may so amend an order. Rule 59(e) states:

> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Judgment in this case was entered October 26, 1965.

The Court's power to reopen judgments in certain situations is expanded and defined, however, by Rule 60(b), which states in part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;

> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . .

The only possible subsection under which the defendants could fall is subsection (6), the "any other reason" clause. It has been repeatedly held that this subsection (a) is subject to the limitation of exercise within a reasonable time, (b) is available only in exceptional circumstances, and (c) cannot be used as a substitute for appeal.

(a) Defendants have waited over five years to pray that the $500.00 assessment be taxed as costs against the plaintiff and the cross-claimant, and over four years to make a similar prayer regarding the $938.38 assessment. It has been over sixteen months since judgment was entered in this case. This is a patently unreasonable time. See, infra, Points and Authorities.

(b) In re "exceptional circumstances," defendants offer no reason whatsoever why they did not put the plaintiff to a litigation of this question through the proper channels, except the excuse of lack of knowledge of the $938.38 assessment, in which counsel for defendants is mistaken.

(c) Regarding the use of this procedure as a substitute for appeal, defendants herein have even gone so far as to wait until after appeal to present this issue. They are thus barred a fortiore.

4. Rule 60(b) provides that motion for relief from judgment for excusable neglect must be filed "not more than one year after the judgment, order, or proceeding was entered or taken." It is conceded that the defendants do not fall within the one year limitation, since their neglect was not excusable; rather, they fall within the "reasonable time" limitation of the Rule. However, it is submitted that it would subvert the purpose and spirit of the Rule to allow a longer period for relief from inexcusable neglect than the Rule allows for excusable neglect.

5. The defendants Morrissettee, in failing to present this issue before either the Trial Court or the Court of Appeals, made a conscious, deliberate election, by which they are now bound. Had the defendants prayed for assessment of the Deputy Auditor's fees as taxable costs, and then lost the case, their own arguments would have worked against them. Now that they have prevailed before the Court of Appeals, they feel safe in raising this issue. Rule 60(b) cannot be used as a vehicle for relief from "free, calculated, deliberate choices." Ackermann v. United States, 340 U.S. 193, 198, 71 S. Ct. 209, 211-12.

6. Defendants' claim of "extreme suffering" is not justified. In their Motion for Assessment of Costs and the accompanying Affidavit of Arthur E. Morrissettee, defendants complain of being forced to endure protracted litigation over a long period of time. This hardship is alleged as a basis for assessment of costs. Plaintiff does not wish to be drawn into a discussion of the facts or merits of the case, because they are irrelevant to this Motion, and because it would be unseemly to indulge in a contest to arouse the Court's sympathy. It will suffice to say that the defendants have obtained for their building $11,879.29 worth of steel from the plaintiff, and $5,426.90 worth of cinder blocks and other materials from the cross-claimant Washington Concrete Sales Corp., for which they have never made payment to anyone. In view of this fact, defendants' complaints of long-suffering are not impressive.

WHEREFORE, plaintiff prays that the Motion for Assessment of costs be dismissed.

/s/

Caruthers, Buscher & Caruthers
Attorneys for Plaintiff
McLachlen Bank Building

* * *

[Certificate of Service]

[Filed May 8, 1967]

ORDER GRANTING MOTION FOR ASSESSMENT OF COSTS

Upon consideration of the motion filed herein by the defendants, Arthur E. Morrissette and Clara M. Morrissette, for assessment of the fees of the auditor paid or charged to said defendants, as taxable costs against the plaintiff, Ronald E. Walutes, trustee of the estate of the Alexandria Iron Works, Inc., a bankrupt, and the cross-claimant, Washington Concrete Sales Corp., Inc., all in the total sum of $1,438.38, as well as the points and authorities submitted by both the plaintiff and the cross-claimant in opposition thereto and the memoranda submitted by all parties together with the argument presented at the hearing on this motion, the Court finds as follows:

1. That the defendants, Arthur E. Morrissette and Clara M. Morrissette, were the prevailing parties in the above-entitled case and as such are entitled to recover their costs.

2. That the fees of the Auditor, just as the fees of a Master, are costs incurred by reason of the litigation and should, under the circumstances prevailing in this case, be assessed as taxable costs.

3. That the fees of the Auditor paid by and chargeable to the defendants, Morrissette, were in the total sum of $1,438.38.

It is therefore by the Court this_____day of April, 1967.

ORDERED:

That in addition to whatever other costs the defendants, Arthur E. Morrissette and Clara M. Morrissette, are entitled to recover against the plaintiff,and the cross-claimant, Washington Concrete Sales Corp., Inc., and said defendants, Arthur E. Morrissette and Clara M. Morrissette, be and they hereby are awarded additional costs of Fourteen Hundred and Thirty-eight Dollars and Thirty-eight cents ($1,438.38) to reimburse them for fees of the Auditor paid by them or chargeable to them and that the said sum of $1,438.38 be entered on the docket as taxable costs against both the plaintiff and the cross-claimant.

/s/ Joseph C. McGarraghy
JUDGE

[Certificate of Service]

[Filed May 18, 1967] 15

MOTION OF PLAINTIFF WALUTES, TRUSTEE, AND DEFENDANT AND CROSS CLAIMANT WASHINGTON CONCRETE SALES CORPORATION TO VACATE ALTER OR AMEND ORDER OF MAY 8, 1967

Come now the plaintiff, Ronald L. Walutes, Trustee, etc., and the defendant and cross claimant Washington Concrete Sales Corporation, by their respective counsel, and respectfully move the court pursuant to Rule 59 (e), Federal Rules of Civil Procedure, to vacate, alter or amend the judgment heretofore entered herein on May 8, 1967, awarding defendants Morrissette judgment against movants for the sum of $1438.38, and as grounds for their said motion allege as follows:

1. Insofar as said order exceeds the sum of $500 prayed for in defendants Morrissette's "Motion for Assessment of Costs", these movants have been denied due process of law, there being no pleading filed herein against them raising any issue as to said excess, and movants have accordingly had no opportunity to file written pleadings or to make oral argument in opposition to said excess over $500. Defendants Morrissette are under no obligation to pay any additional sums herein and they may never pay the Auditor the additional $938.38 for which they have been awarded a judgment against these movants. Defendants Morrissette have no standing to enforce a claim for Auditor's costs and fees herein which have never been determined to be due to the Auditor and for which the Auditor himself has never asked the court for a judgment in his favor against any of the litigants in this case.

2. There has never been any request by, or finding of the court determining the amount of the auditor's fees and expenses in this case, so that the order of this court of May 8, 1967, awarding defendants Morrissette judgment for said excess of $938.38 is, to say the least, premature.

3. The auditor of this court has never claimed that these movants are indebted to him for the entire costs of the reference. By letters to these movants dated March 14, 1967, the auditor requested payment of the sum of $290.89 from Washington Concrete Sales Corporation and $647.48 from the plaintiff. Said letters are filed herein and made exhibits to this motion, and are prayed to be read as a part hereof. Movants say that their liability for further costs herein, if any, should not exceed the amount which the auditor has demanded of them.

4. This court lacks the power to tax the sums requested by the defendants in their "Motion for Assessment of Costs" for the reason this litigation has ended following the judgment of the Court of Appeals, and there has been no prior order herein providing for taxing auditor's fees or expenses as costs herein.

5. Defendants Morrissette have filed no counterclaim herein against either of these movants, and there is no basis in the pleadings for awarding said defendants any sums against these movants or either of them.

6. The defendants Morrissette, on or about February 6, 1962, filed a motion herein to vacate the Deputy Auditor's order requiring them to pay the sum of $500 to defray a portion of the expense of the reference. This matter was fully briefed and argued before Judge Curran of this Court, who, on March 28, 1962, denied the Morrissette's motion to vacate the order of the Deputy Auditor. This ruling by Judge Curran became the law of the case, and no appeal was taken from it by the Morrissettes when this case went to the Court of Appeals, so that it has now become final and forecloses the Morrissettes from again raising the same question in their "Motion for Assessment of Costs" filed herein after final judgment had been rendered in this case by the Court of Appeals.

7. Movants request the right to orally argue this motion.

Paul Lee Sweeny, Attorney for
Washington Concrete Sales Corporation

* * *

[Certificate of Service]

Donald S. Caruthers, Attorney for
Ronald L. Walutes, Trustee, etc.,

* * *

[Filed May 18, 1967]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE, ALTER OR AMEND ORDER OF MAY 8, 1967

1. Last paragraph of defendants' "Motion for Assessment of Costs" containing demand of said defendants for an order "fixing the sum of Five Hundred ($500.00) Dollars paid by them to the Auditor of this court as part of the taxable costs which they are entitled to recover against both parties. . .".

2. Order of March 28, 1962, entered herein by Judge Curran denying defendants Morrissette's motion to vacate the order of the Deputy Auditor requiring them to pay the said $500 as part of the expenses of the reference.

3. The pleadings and proceedings in this case.

4. Title 28, Sections 1920 & 1921, U.S.C.A.

5. Section 11-1501 to Section 11-1521, inclusive, of the District of Columbia Code (1961), now sections 15-701 to 15-716, 1966 Supp. to D.C. Code of 1961.

6. Adlung, Executor v. Gotthardt, et al., 103 U.S. App. D.C. 195, 257 F. 2d 199.

7. Mallonee v. Fahey, D.C. Cal. 1953, 117 F. Supp. 259, 272, where the court said:

> "The fees and costs of the Special Master do not appear to be included within those which might be settled by the Clerk under Section 1920 of Title 28 USCA. Such fees and costs must be fixed and assessed by the court. . . ." (underscoring supplied).

Rule 53 (a) F.R.C.P. provides in pertinent part:

> "The compensation to be allowed to a master shall be fixed by the court. . . ." (underscoring supplied).

The court has never fixed the compensation to be allowed to the Deputy Auditor, sitting as a Special Master under Rule 53 (a) F.R.C.P. in this case, and this being so, defendants Morrissette cannot recover a judgment against movants for any part of the Deputy Auditor's compensation; unless and until the court fixes the compensation of the Deputy Auditor, sitting as a special master under Rule 53 (a) F.R.C.P., the auditor cannot recover any part of the same from any of the parties. Since the auditor cannot recover his compensation from any of the parties in the present posture of this case,there being no order of this court fixing the same, the defendants Morrissette certainly have no right to a judgment against these movants for $938.38 which they not only have not paid to the auditor, but which has never been allowed by the court to the auditor in this case.

PAUL LEE SWEENY
Attorney for Washington Concrete
Sales Corporation
* * *

DONALD S. CARUTHERS
Attorney for Ronald L. Walutes,
Trustee, etc.,
* * *

[Filed May 25, 1967]

OPPOSITION OF DEFENDANTS MORRISSETTE TO MOTION TO VACATE, ALTER, OR AMEND ORDER OF MAY 8, 1967

Come now the defendants, Arthur E. Morrissette and Clara M. Morrissette, and in opposition to the Motion of plaintiff Walutes and defendant, cross-claimant, Washington Concrete Sales Corp. to Vacate, Alter or Amend the Order of May 8, 1967, state as follows:

1. Movents' first argument misstates the facts of this case; is an attempt to mislead the Court and is res judicata, and are therefore untimely.

2. Movents' second, third, fourth, fifth and sixth arguments are res judicata and are therefore untimely.

WHEREFORE the premises considered defendants, Morrissette, pray that the aforementioned motion be dismissed and denied without an oral hearing.

/s/ Milton M. Burke
Attorney for Defendants,
Morrissette

* * *

[Proof of Service]

POINTS AND AUTHORITIES

1. Movents' first argument misstates the facts of this case, is an attempt to mislead the Court and is res judicata.

Movents argue that the May 8, 1967 Order of this Court constitutes a denial of due process of law as to them since the Order exceeds the sum of $500.00 prayed for in defendants, Morrissettes' Motion for Assessment of Costs.

The attention of this Court is respectfully directed to the first paragraph of the aforementioned Motion for Assessment of Costs filed on March 15, 1967, where it is prayed that:

> ". . . the sum of $500.00 paid by the defendants, Morrissette, to the Auditor of this Court in the above-entitled case as well as the additional sum of $938.38, requested by the Auditor from the plaintiffs . . ." be assessed as costs.

Furthermore, this point was argued at the oral hearing of this Motion by the movents and was a basis for the Order of this Court. There is no surprise or new claim.

Consequently, the matter is res judicata and cannot be brought up again at this time.

2. Movents' second, third, fourth, fifth and sixth arguments are res judicata and are therefore untimely.

Movents in their second, third, fourth, fifth and sixth arguments repeat matters which relate to the substance of the aforesaid Motion for Assessment of Costs. Nothing new is added.

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, . . . has litigated or had an opportunity to litigate the same matter in a former action . . ." Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48 18 S. Ct. 18, 42 L. Ed. 355.

All those points raised now are one which were raised or should have been raised in Opposition to the Motion for Assessment of Costs prior to the oral hearing and are now res judicata.

Consequently, the instant Motion should be dismissed or denied without an oral hearing.

CONCLUSION

It is apparent from the course of conduct of the movents that the movents are interposing baseless and nonsensical procedures which have absolutely no basis in fact or law. This becomes apparent from a glance at movents' points and authorities.

First, they quote in misleading fashion from the Motion for Assessment of Costs; statutory law is cited which has absolutely no bearing and is not in any sense germain to the questions before the Court; cases are cited which likewise have nothing whatever to do with the subject matter of the instant Motion.

Anything which has been put forth by the movants in the instant Motion has been, or should have been, put forth in the Opposition to the Motion for Assessment of Costs and therefore now res judicata.

It is clear that these movents are engaged in a brazen attempt to throw every possible legal road block into the path of the defendants, Morrissette, in a wild hope to either force a favorable settlement or to cause prejudicial delay to the Motion.

Consequently, it is respectfully urged that this Court deny summarily the Motion now before the Court without an oral hearing.

/s/ Milton M. Burke
Attorney for Defendants,
Morrissette

[Filed May 26, 1967]

ORDER

Upon consideration of the motion of Plaintiff Walutes, Trustee, and Defendant and Cross Claimant Washington Concrete Sales Corporation to vacate, alter or amend Order of May 8, 1967 filed herein May 18, 1967, it is this 26th day of May, 1967,

ORDERED that the said motion be and the same hereby is denied.

ROBERT M. STEARNS, CLERK
By: /s/ Amelia G. Shannon
Deputy Clerk

JOSEPH C. McGARRAGHY
Presiding Judge

[Filed June 26, 1967]

NOTICE OF APPEAL

Notice is hereby given this 25th day of June, 1967 that Ronald L. Walutes, Trustee of the Estate of Alexandria Iron Works, Inc., a bankrupt, and Washington Concrete Sales Corporation, Inc., a corporation hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 8th day of May, 1967 in favor of Arthur E. Morrissette and Clara M. Morrissette against said Ronald L. Walutes, Trustee of the Estate of the Alexandria Iron Works, Inc., a bankrupt, and Washington Concrete Sales Corporation, Inc., a corporation.

/s/ Paul Lee Sweeny
Attorney for Washington
Concrete Sales Corp.,
In., a corporation.

/s/ Donald S. Caruthers, Attorney
for Ronald L. Walutes, Trustee
of the Estate of Alexandria Iron
Works, Inc., a bankrupt.

Milton M. Burke
* * *

Kahl K. Spriggs
* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AUDITOR
* * * *

October 12, 1967

Alexandria Iron Works, Inc., Plaintiffs, :
vs. : Civil Action No. 333-56
Arthur E. Morrissette, et al., Defendants. :

In payment of judgment entered by the Court on June 13, 1967 in favor of the Auditor of this Court and against Arthur E. and Clara M. Morrissette $938.38

Arthur E. Morrissette,
Clara M. Morrissette,
821 Howard Road, S. E.,
Washington, D. C. 20020

[Paid, October 12, 1967
Auditor, United States
District Court for the
District of Columbia]

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 21,195

RONALD L. WALUTES,
Trustee of the Estate of the Alexandria Iron Works, Inc.,
a bankrupt,
and
WASHINGTON CONCRETE SALES CORP., INC.,
a corporation,

Appellants,

v.

ARTHUR E. MORRISSETTE
and
CLARA M. MORRISSETTE,

Appellees.

**Appeal from a Judgment
of the United States District Court
for the District of Columbia**

PAUL LEE SWEENY

406 Southern Building
Washington, D. C.

Counsel for Washington Concrete Sales Corp., Inc., a corporation

DONALD S. CARUTHERS

McLachlen Bank Building
700 Tenth Street, N. W.
Washington, D. C. 20001

Counsel for Ronald L. Walutes, Trustee of the Estate of the Alexandria Iron Works, Inc. a bankrupt

APPELLANTS' STATEMENT OF QUESTION PRESENTED

The question is whether, after this case had already been appealed to this Court and final judgment rendered on such appeal, could the Trial Court properly award appellees judgment against appellants for $1,438.38 as "taxable costs" herein, where appellees had paid only $500.00 of said amount to the Auditor after being ordered to do so by order of the Trial Court entered on April 4, 1962, from which order appellees took no appeal; where the remaining $938.38 was not prayed for in appellees' motion filed in the Trial Court, and no part of the same was ever paid by appellees to the Auditor or to anyone else; where no motion was ever filed by the Auditor or hearing held on the question of the allowance of compensation to the Auditor, and no order was ever entered fixing the Auditor's compensation or charging the same upon any of the parties as provided for in Rule 53 (a) F.R.C.P.; and where the Auditor, in his report filed with the Trial Court, asked that the costs of the reference be divided, one half to be charged to the appellees and that the appellants be charged with the other one half ratably according to the amount of their claims by the payment of $647.48 and $290.90, respectively.

INDEX

INDEX

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,195

RONALD L. WALUTES,
Trustee of the Estate of the Alexandria Iron Works, Inc.,
a bankrupt,
and
WASHINGTON CONCRETE SALES CORP., INC.,
a corporation,

Appellants,

v.

ARTHUR E. MORRISSETTE
and
CLARA M. MORRISSETTE,

Appellees.

**Appeal from a Judgment
of the United States District Court
for the District of Columbia**

JURISDICTIONAL STATEMENT

This is an appeal by Ronald L. Walutes, Trustee of the Alexandria Iron Works, Inc., a bankrupt, plaintiff below, and by Washington Concrete Sales Corporation, Inc., a corporation, defendant and cross-claimant

below, in a civil action originally brought by the Alexandria Iron Works, Inc. against the defendants Morrissette (appellees here), and others. The complaint of Alexandria Iron Works, Inc. was brought pursuant to Title II, Sections 305 and 306, and Title 38, Section 110 of the District of Columbia Code, 1951 Edition, as appears from paragraph 1 of the "Complaint to Enforce Mechanic's Lien" (JA 8). The appellant Washington Concrete Sales Corporation, Inc. filed an answer and cross claim against the defendants Morrissette and another praying for the enforcement of its mechanic's lien against the property of the owners (JA 11-13). On previous appeals by both of the present appellants against the present appellees, this Court, *sua sponte*, consolidated both appeals for all purposes, said appeals being cases numbered 19,872 and 19,873 in this Court. After the affirmance of the Trial Court's judgment on the former appeals, the appellees filed a "Motion for Assessment of Costs" in the Trial Court, which resulted in a final order and judgment of the United States District Court for the District of Columbia entered on May 8, 1967, awarding appellees judgment against appellants for the sum of $1,438.38. Appellants filed a timely motion to vacate, alter or amend the judgment of the Trial Court under Rule 59 (e) of the Federal Rules of Civil Procedure, which motion was denied by the Trial Court by order dated May 26, 1967, following which Notice of this appeal was timely filed.

This Court has jurisdiction of this appeal under Title 28, Section 1291, of the United States Code Annotated.

STATEMENT OF THE CASE

The instant case was commenced on August 9, 1956 by the filing of a complaint to enforce a mechanic's lien by Alexandria Iron Works, Inc., against the real estate of the defendants Morrissette, wherein there were named as defendants the principal contractor who constructed a warehouse on Morrissettes' land, and other persons who had filed liens against the

defendants Morrissettes' land, including the appellant Washington Concrete Sales Corporation, a corporation, which furnished all of the cinder block used in the construction of the said warehouse, besides other materials. Appellant Washington Concrete Sales Corporation filed an answer and cross claim against the defendants Morrisette, appellees here, praying for the enforcement of its lien for materials furnished and used in the construction of said warehouse by the principal contractor.

On February 29, 1959, the District Court referred the instant case to the Auditor under Rule 53 of the F.R.C.P. The hearings and proceedings before the Deputy Auditor, to whom the case was assigned, extended over a period of nearly four years. While the case was thus pending before the Deputy Auditor, the latter entered an order on January 29, 1962, requiring the defendants Morrisette, appellees here, to deposit the sum of $500.00 with the Deputy Auditor as indemnity toward the reporting expenses to be incurred and at the same time required appellants to post security in the sum of $1,000.00. Appellees thereupon filed a motion in the Court below to vacate said order of the District Court which motion was, after argument, denied by Judge Curran (JA 15, 16). No appeal was taken by appellees from Judge Curran's denial of their motion to vacate the order of the Deputy Auditor.

The evidence and proceedings before the Deputy Auditor consisting of 1178 pages of transcript and some 125 exhibits, were filed in the Trial Court on January 18, 1963, together with the Deputy Auditor's Report and Findings. In paragraph 33 of his Report, the Deputy Auditor reported that the cost of stenographic transcript of hearings held on 13 days or parts of days was $1,351.75 paid from $600.00 deposited by plaintiff or its trustee in bankruptcy, the appellant Walutes on this appeal, $300.00, deposited by Washington Concrete Sales Corporation, the other appellant here, and $500.00 deposited by the defendants Morrissette, appellees here, making a total of $1,400.00, leaving a balance of $48.25 applicable to the charge

of the Auditor's office for executing the order of reference (JA 192). In addition, $200.00 was deposited by others, of which $125.00 was refunded. The Deputy Auditor then stated that he "makes a charge of $2,000.00 for executing the order of reference, to which will be applied said $48.25, $25.00 and $50.00, resulting in a balance of $1,876.75 due the Auditor's office." Following the rationale of *Tendler v. Jaffee*, 92 U. S. App. D. C. 2, 3, it is recommended that the balance of $1,876.75 be assessed one-half against the defendants Morrissette or $938.37, and that the remaining $938.38 be assessed against the Trustee in bankruptcy of the plaintiff and Washington Concrete Sales Corporation ratably according to the amounts of their claims, or 69%, or $647.48 against said Trustee of plaintiff, and 31% or $290.90 against Washington Concrete Sales Corporation, and that if said amounts are not paid to the Auditor's office within ten days after the filing of this report, that the Auditor of the Court be granted judgments therefor (JA 193). The foregoing amounts were never paid to the Auditor's office, and no judgment had been rendered therefor at the time appellees obtained the judgment against appellants.

The foregoing is the only request for judgment for costs and/or fees ever made herein by the Auditor's office up to and including the date of the judgment of the Trial Court appealed from. As will hereinafter appear, although the Auditor asked for judgment against appellant Walutes in the amount of $647.48 only, and against Washington Concrete Sales Corporation in the amount of $290.90 only, the Trial Court, on May 8, 1967, entered judgment in favor of appellees in the amount of $1,438.38 against appellant Walutes and also against appellant Washington Concrete Sales Corporation (SJA 14).

No judgment for Auditor's fees or costs was awarded by the Trial Court's final judgment of October 26, 1965 (JA 241-249) and no mention whatsoever was made of the same. No appeal was taken from the final judgment of the Trial Court by Appellees, they apparently being content to let the costs fall where they were until they found out how they would come

out on the appeal. It was not until *after* the Trial Court's final judgment of October 26, 1965, had been affirmed by this Court, in cases numbered 19,872 and 19,873, and the judgment of this Court had become final, that the defendants Morrissette for the first time raised the question of Auditor's fees and costs by filing their "Motion for Assessment of Costs" in the Trial Court and served the same on appellants' counsel on March 15, 1967, wherein defendants Morrissette, appellees here, prayed "the Court for an order fixing the sum of Five Hundred ($500.00) Dollars paid by them to the Auditor of this Court as part of the *taxable costs* which they are entitled to recover against both parties, jointly and severally". (SJA 4), and cited as authority for their motion "Rule 54 (d)", "General Powers of this Court" and defendants Arthur E. Morrissette's affidavit.

Despite the opposition of appellants to said motion, and their Answer to Motion and their points and authorities filed in support of their opposition, the Trial Court, without hearing any evidence, and without having first fixed any compensation or expenses whatsoever to the Auditor, as it was required to do first by Rule 53 (a), F.R.C.P., nevertheless, on May 8, 1967, signed an order prepared and submitted by appellees' counsel wherein he made findings and granted appellees judgment not for $500.00 as prayed for in their motion, but for "additional costs of Fourteen Hundred and Thirty Eight Dollars and Thirty Eight Cents ($1,438.38) to reimburse them for fees of the Auditor paid by them or chargeable to them and that the said sum of $1,438.38 be entered on the docket as *taxable* costs against both the plaintiff and the cross-claimant" (SJA 14), notwithstanding the fact that the Auditor had asked the Trial Court to allow him not more than $647.48 against appellant Walutes and not more than $290.90 against the appellant Washington Concrete Sales Corporation. (JA 193), and notwithstanding the further fact that the appellees had paid the Auditor only $500.00, and had taken no appeal from the order of the Trial Court requiring them to pay said sum (JA 15, 16).

The first notice to appellants that appelles were asking the Trial Court not for $500.00 as prayed in their "Motion for Assessment of Costs", but for $1,438.38 came when appellees counsel submitted a proposed order to the Trial Judge and mailed a copy to appellants' counsel. Appellants thereupon promptly advised the Trial Judge by letter dated April 28, 1967, that appellees' proposed order was objectionable for the further reason, *inter alia*, that the defendants Morrissette prayed for $500.00, not $1,438.38, and appellants had no opportunity to orally argue against, or otherwise make known their objections to the larger sum which defendants counsel had expanded their proposed order to cover (SJA 14).

Thereafter, on May 18, 1967, appellants filed their motion under Rule 59 (e), F.R.C.P., to vacate, alter or amend the Trial Court's order of May 8, 1967, together with their points and authorities in support thereof, which motion was denied by the Trial Court on May 26, 1967, without a hearing, following which Notice of Appeal was filed on Monday, June 26, 1967.

STATUTE INVOLVED

Title 28, Section 1920, United States Code Annotated, involved on this appeal, provides as follows:

> "Section 120. Taxation of costs.
> "A judge or clerk of any of the United States may tax as costs the following:
>
> "(1) Fees of the clerk and marshal;
> "(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> "(3) Fees and disbursements for printing and witnesses;
> "(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> "(5) Docket fees under section 1923 of this title.
> "A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.
> June 25, 1948, c. 646, 62 Stat. 955."

RULE INVOLVED

Rule 53 (a) of the Federal Rules of Civil Procedure reads as follows:

> "(a) Appointment and compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

STATEMENT OF POINTS

1. The Trial Court erred in awarding appellees judgment against appellants in the amount of $1,438.38 as "taxable costs" herein.

2. The Trial Court lacked jurisdiction to reopen the judgment in this case after it had become final by previous appeal to this Court and award further sums not authorized by Title 28, Section 1920 of the United States Code Annotated to appellees against appellants, where such further sums were not permitted to be taxed as costs by Section 1920 of Title 28, there having been no request by the Auditor for judgment against appellants for more than $647.48 and $290.90, respectively, and the court not having fixed any compensation to be allowed to the Auditor as required by Rule 53 (a) of the F.R.C.P.

3. The Trial Judge denied appellants due process of law when he awarded appellees judgment against appellants in the amount of $1,438.38 after appellees had prayed for only $500.00 in the prayers of their motion.

Appellants were given no notice of, or any opportunity to argue against the larger claim of appellees.

4. The Trial Court erred in awarding appellees judgment against appellants for $1,438.38 when appellees had never paid this amount to the Auditor or to anyone else and may never pay it to anyone, and "the compensation to be allowed to (the Auditor) . . ." had never been fixed by the court or charged upon any of the parties, and judgment of the Trial Court had become final by appeal to this Court in cases numbered 19,872 and 19,873.

5. The Trial Court erred in imposing upon appellants the entire cost of the reference in this case reported by the Auditor where the Auditor asked that the costs of the reference be divided, and asked in his Report only for $647.48 and $290.90 against the appellants, respectively, and where no compensation had been allowed to the Auditor or charged upon the parties by the Court as required by Rule 53 (a) F.R.C.P.

6. The Trial Court erred in awarding appellees judgment against appellants for $500.00 deposited by appellees as costs with the Auditor, after the Trial Court (Judge Curran) denied appellees' motion to vacate the Auditor's order and required appellees to pay said sum of $500.00, where appellees did not appeal from Judge Curran's order when this case was previously appealed to this Court.

7. The Trial Court erred in awarding appellees judgment against appellants for compensation never allowed to the Auditor or fixed by court as required by Rule 53 (a) F.R.C.P.

8. The Trial Court erred in taxing as costs against appellants the fees and expenses of the Auditor after the refusal of the clerk to do so, when Title 28, Section 1920, U.S.C.A., which specifies those matters which may be included in a bill of costs and taxed as such makes no mention of Auditor's fees or expenses, where the judgment of the court had already become final by appeal.

9. The Trial Court erred in awarding appellees a money judgment for matters not included within the provisions of Title 28, Section 1920, U.S.C.A., where no counterclaim was filed by appellees against appellants or either of them.

SUMMARY OF ARGUMENT

Section 1920 of Title 28 of the U.S.C.A. sets forth those matters which can be taxed as costs in the District Court after final judgment has been rendered in a case. Said section makes no mention of Auditor's fees or costs and the Trial Court was without jurisdiction, after the judgment in this case had become final by appeal, to reopen the judgment and add $1,438.38 to it in favor of appellees against appellants. Appellees had no standing in the Trial Court, after judgment in this case had become final by appeal to this court, to ask for a money judgment against appellants in any amount not allowed to them by the judgment of this Court, but were limited thereafter to asking the clerk or judge to tax as costs those items set forth within Title 28, Section 1920, U.S.C.A. and no others. Insofar as the appellees' payment of $500.00 to the Auditor was concerned (and this is all that appellees have ever paid to the Auditor), the Trial Court had already ruled against them on April 4, 1962, when it denied their motion to vacate the Auditor's order requiring the appellees to pay said sum of $500.00, and appellees took no appeal from the Trial Court's ruling of April 4, 1962, which has long since become final (JA 15). No compensation or expenses, in any amount, had been fixed by the Trial Court to the Auditor at the time appellees filed their motion in the Trial Court or at the time the order appealed from was entered on May 8, 1967, and the Auditor never asked that appellants bear the entire cost of the reference but asked only that appellants be charged with the sum of $647.48, and $290.90, respectively, and that, following the rationale of *Tendler v. Jaffee*, 92 U.S. App. 2, 203 F2d 14, that the costs of the reference be divided between appellants and appellees (JA 176, 192 and 193).

In the absence of an allowance by the Court, the Auditor had no enforceable claim against any of the parties for his fees and expenses (Rule 53 (a) F.R.C.P.). In the absence of an enforceable claim by the Auditor, the appellees could have no claim against appellants for Auditor's fees and expenses which the court had never fixed as being due to the Auditor. Yet the Trial Court, after rendition of final judgment by this Court, awarded appellees judgment against appellants for monies never awarded or fixed to the Auditor by the court and never paid by appellees to the Auditor. In the posture of the case after the final judgment of this Court, there was nothing in the record or the statute (Title 28, Section 1920, U.S.C.A.) on which the Trial Court could base a judgment for any sum of money in favor of appellees against appellants other than what was included in the judgment of this Court, and the appropriate terms specifically set forth in Title 28, Section 1920, U.S.C.A.

The judgment of the Trial Court had become final by appeal before appellees filed their motion in the Trial Court for an award of $500.00 additional "taxable costs" against appellants. Only those "costs" enumerated in Title 28, Section 1920, U.S.C.A., may be taxed after final judgment, unless previously authorized by the Court. If this were not so, Title 28, Section 1920 would be meaningless. It is undoubtedly true that the Trial Court could have made a determination of the amount of the Auditor's fees and upon which parties to charge the same if a motion for that purpose had ever been made. But the Auditor never made such a motion in this case, and no hearing for the purpose of fixing the Auditor's compensation was ever held in the Trial Court. It was certainly open to the Auditor to make a motion for the court to fix his compensation, and to determine who the same should be charged against. Had appellees desired to raise any question concerning Auditor's fees, they should have asked the Auditor to file a motion requesting that the Trial Court fix the compensation of the Auditor and charge the same upon the parties as the court may direct, in accordance

with the provisions of Rule 53 (a), F.R.C.P., and the question of who such fees should be charged upon could have been settled on the former appeal in this case. Instead, appellees chose not to make any issue as to the fees and costs of the Auditor, either at the time of the final judgment of the Trial Court on October 26, 1965, or on the appeal to this Court, choosing instead to wait and see how the former appeal was decided before making an issue of such fees and costs. Appellees apparently refrained from raising any question as to who should pay the Auditor's fees and costs until after they knew the outcome of the previous appeal, in the apparent belief that had appellees lost the previous appeal, the Auditor's recommendation that the fees and costs of the reference be divided would control, there being no order of the court determining the matter either way or fixing the amount of the Auditor's compensation or determining upon whom the same should be charged as required by Rule 53 (a) F.R.C.P.

Having acquiesced in the judgment of the Trial Court which made no determination of the amount of the Auditor's compensation or who should bear the same, appellees should not be permitted to raise the question for the first time after the judgment of the Trial Court has become final by appeal. Appellees apparently were satisfied with the request of the Auditor that the fees and costs of the Auditor be divided between appellants and appellees before they knew the outcome of the previous appeal.

Appellees prayed for an award of $500.00 against appellants in their motion filed after final judgment (SJA 4). Thereafter, without notice to appellants and without affording them an opportunity to be heard, the Trial Court entered judgment against appellants not for $500.00, but for $1,438.38. The additional $938.38 included by the Trial Court in its judgment in favor of appellees against appellants had not been paid by appellees to the Auditor, there was no order of court requiring appellees to pay said sum to anyone or charging it upon appellees. The Auditor had not requested that said sum of $938.38 be charged upon appellants, and

there was no order of court allowing said sum to the Auditor, as required by the Rule. In thus entering up judgment for $1,438.38 in favor of appellees against appellants the Trial Court denied appellants due process of law.

ARGUMENT

I.

THE MANNER OF FIXING THE AUDITOR'S COMPENSATION AND CHARGING THE SAME UPON THE PARTIES IS GOVERNED BY RULE 53 (a), F.R.C.P. THE TRIAL COURT FAILED TO ACT IN ACCORDANCE WITH THE PROVISIONS OF SAID RULE WHEN IT ENTERED UP JUDGMENT FOR $1,438.38 AGAINST APPELLANTS WHEN THERE HAD BEEN NO ORDER FIXING THE AUDITOR'S COMPENSATION OR CHARGING IT UPON ANY OF THE PARTIES.

Under the plain language of Rule 53 (a), of the Federal Rules of Civil Procedure, the court was required to first fix the compensation of the Auditor before charging the same upon any of the parties. Said Rule reads, in pertinent part, as follows:

> " . . . The compensation to be allowed to a master *shall be fixed by the court,* and shall be charged upon such of the parties . . . as the court may direct . . . When the party ordered to pay the compensation allowed by the court does not pay it *after notice and within the time prescribed by the court,* the master is entitled to a writ of execution against the delinquent party." (Emphasis added.)

Thus it is clear from the foregoing language of the Rule that the first move is up to the master (or Auditor, in the case at bar) to file a motion asking the court to fix his compensation. And *after* fixing the master's compensation, the court then directs upon which of the parties the same shall be charged.

In the case at bar, the court never fixed the master's compensation, but nevertheless gave Morrissettes a judgment against appellants for $1,438.38. The Auditor never filed any motion asking the court to fix his compensation or charge the same upon the appellants, and never asked for the result reached by the Trial Court. The most the Auditor has asked for is judgment against appellants in the amounts of $647.48 and $290.90, respectively. The Auditor recognized the fairness of the Rule in *Tendler v. Jaffee*, 92 U.S. App. D.C. 2, 5, 203 F.2d 14, where, in a case where the proceedings lasted all or part of eleven days and extended over a long period of time, this Court reversed the Trial Court's order that appellants pay the entire cost of the reference and ordered the same divided. The Auditor recognized that the hearings in the case at bar were more extended than those in *Tendler v. Jaffee*, lasting all or a part of thirteen days and extending over a period of nearly four years, and asked only that appellants be required to pay the aforementioned sums. Presumably the Auditor preferred not to go beyond the request and recommendation which he made in his Report in this case.

Rule 53 (a), supra, does not give any of the parties to the suit a right to a writ of execution against any of the other parties. It gives this right only to the master or auditor. Yet the Trial Court by its order of May 8, 1967 has given appellees a judgment and attendant writ of execution against appellants for auditor's costs never paid by appellees and never fixed by the Court. Nothing in Rule 53 (a) justifies, either directly or inferentially, any such course of action as this. If it was proper to fix an award of compensation and costs to the Auditor, such award should have been to the Auditor and not to appellees, and in an amount not to exceed that asked for by the Auditor against appellants.

The final judgment of the Trial Court of October 26, 1965, did not fix any compensation to the Auditor and did not, of course, charge any of the parties with the payment of Auditor's costs or compensation. Consequently,

when the Trial Court entered judgment on May 8, 1967, against appellants, in the amount of $1,438.38, there was no order of the Trial Court fixing the amount of the Auditor's compensation nor charging the same upon any of the parties. In awarding appellees said judgment of May 8, 1967, the Trial Court did not comply with the provisions of Rule 53 (a) F.R.C.P. Said judgment was entered without authority in law and should be set aside.

II.

THE TRIAL COURT EXCEEDED ITS POWERS WHEN IT AWARDED APPELLEES JUDGMENT AGAINST APPELLANTS FOR $1,438.38 ON MAY 8, 1967.

In giving appellees a judgment against the appellants for $1,438.38, the Trial Court put the cart before the horse and exceeded its powers in the following respects:

(a) The Trial Court ignored the fact that appellees had already been ordered to pay $500.00 of said sum by Judge Curran's order of April 4, 1962 (JA 15), and no appeal had been taken from that order, so that the same had become a final judgment which the court was without power to change by its order of May 8, 1967, entered more than five years later.

(b) The Trial Court's only authority for entering judgment against appellants for Auditor's fees is contained in Rule 53 (a), F.R.C.P. Neither Title 28, Section 1920, nor any other *statute* gives the Trial Court authority to enter judgment for Auditor's fees. This is clear from a careful reading of Title 28, Section 1920, U.S.C.A., and was so held by the court in *Mallonee v. Fahey* (D.C.S.D. Calif. 1953), 117 F. Supp. 259, 272, where the Court said:

> "The fees and costs of the Special Master do not appear to be included within those which might be settled by the clerk under Section 1920 of Title 28, U.S.C.A."

If the clerk could not settle the fees and costs of the Special Master (or Auditor) under Section 1920, then it is clear that the court likewise could not do so since the power granted by the statute to a clerk is co-extensive with the power granted to a judge, and the same power extends alike to "a judge or clerk of any court of the United States." It therefore follows that if the clerk does not have the power to tax Auditor's fees under Title 28, Section 1920, the judge likewise does not have such power under said statute.

Thus, Rule 53 (a), F.R.C.P., becomes the only authority under which the Trial Court could fix the fees of the Auditor. This Rule necessarily presupposes a motion by the Auditor before action is taken by the court. In the case at bar, the Trial Court acted without any motion by the Auditor. Instead, appellees filed their "Motion for Assessment of Costs", in which they prayed for judgment against appellants *in the amount of $500.00.* This was the same $500.00 which appellees had been required to pay by Judge Curran's order of April 4, 1962 from which order appellees took no appeal. The order of May 8, 1967, went beyond the prayers of appellees' own motion, and awarded appellees judgment for $1,438.38 against both appellants "to reimburse them (appellees) for fees of the Auditor paid by them or chargeable to them", when in fact no fees of the Auditor had been charged to appellees by the Court. Rule 53 (a), F.R.C.P., provides that the compensation to be allowed to a master (Auditor) shall be fixed by the Court, "and shall be charged upon such of the parties . . . as the *Court* may direct". *Only the Court had the power under Rule 53(a) to charge any fees of the Auditor to appellees and the Court had never done so.* When the Court recited, in its order of May 8, 1967, that it was awarding appellees judgment against appellants to reimburse appellees for fees of the Auditor chargeable to them, it committed clear error, and exceeded its powers under the Rule by awarding appellees judgment against appellants for $1,438.38 "to reimburse them (appellees) for fees of the Auditor

paid by them or chargeable to them" when in fact no fees had been charged to appellees by the Court as required by Rule 53 (a), F.R.C.P.

What the Court should have done, and the only thing it was empowered to do by Rule 53 (a) was to first fix the compensation to be allowed to the Auditor after the filing of a motion for that purpose by the Auditor. Upon the present state of the record in this case, the Auditor has never asked for an award of more than $647.48 and $290.90, respectively, against the appellants (JA 176), and the Auditor has never filed any motion asking for the allowance of even those amounts or that they be charged upon appellants.

By its action in awarding appellees judgment against appellants for $1,438.38 without requiring the Auditor to file a motion to have his compensation fixed by the Court, and without holding any hearing upon such a motion preliminarily to fixing the compensation of the Auditor and charging the same against the parties to the case, the Trial Court never had the benefit of the Auditor's or the parties' evidence, and never heard a statement of the Auditor's reasons for asking the Court to charge his compensation equally upon the parties. The Trial Court was, therefore, in no position to fix the Auditor's compensation or to make a determination as to which of the parties to charge the same upon, as provided by Rule 53 (a), and when it entered its judgment of May 8, 1967, awarding appellees judgment against appellants for the sum of $1,438.38 in the foregoing manner, the Court exceeded its power under Rule 53 (a).

The Trial Court lacked power to award judgment in favor of appellees against appellants for Auditor's fees never fixed by the Court, there being no statute or rule authorizing the award of such a judgment. In *Adlung, Executor v. Gotthardt et al.*, 103 U. S. App. D. C. 195, 257 F.2d 199, where the executor of a decedent's estate sought to assess the commissions of a court-appointed collector against the unsuccessful caveator of decedent's

will, this Court affirmed the Trial Court's denial of the Executor's motion and said (page 196 of 103 U.S. App. D.C.):

> " . . . The executor has pointed to no statute which clearly supports his position. D. C. Code Sec. 11-518 (1951) on which he principally relies, appears to us to give him little or no help . . . *It may well be doubted that the District Court had power to make the award requested by the executor,* see D. C. Code Section 11-1501, 11-1503 (1951), at least in the absence of fraud or unconscionable conduct on the part of the caveators . . . " (Emphasis added.)

(c) By entering judgment against appellants for $1,438.38 in favor of appellees when appellees' motion prayed for $500.00 only, the Trial Court denied to appellants the right to notice of the amount being claimed by appellees in their motion and the right to file a memorandum in opposition and to argue against awarding appellees $1,438.38. The very purpose of requiring appellees' motion to be served on appellants is to apprise appellants of the amount of money being asked from them and to enable appellants to file a brief in opposition and to argue orally against the granting of the prayers of appellees' motion. Appellees prayed for judgment for $500.00 against appellants on the grounds they had paid this sum to the Auditor. They have never paid the remaining $938.38 to the Auditor or to anyone else, and the same had not been charged to appellees as they erroneously stated it had in their motion. By their failure to pray for recovery of the additional $938.38 in the prayers of their motion, appellees mislead appellants into believing that only $500.00 was sought by appellees in their motion, and appellants were thereby deprived of any opportunity to defend or argue against the additional $938.38, for which the Trial Court awarded appellees judgment against appellants after appellees had prayed for judgment for $500.00 only against appellants. This action of the Trial Court was without authority in law and denied appellants due process of law in that they were given no notice of or opportunity to defend against the additional $938.38 awarded appellees which was not prayed for in appellees'

motion. The prayer of appellees' aforesaid "Motion for Assessment of Costs" is as follows:

> "Wherefore, the defendants, Morrissette, respectfully pray the Court for an order fixing the sum of Five Hundred ($500.00) Dollars paid by them to the Auditor of this Court, as part of the taxable costs which they are entitled to recover against both parties, jointly and severally."

It was on this state of the record, and without any other or further notice to appellants, that the Trial Court entered judgment against appellants in favor of appellees, not for $500.00 as prayed for by appellees, but for $1,438.38, which appellees never prayed for.

CONCLUSION

It is submitted that the judgment of the Trial Court of May 8, 1967, awarding appellees judgment for $1,438.38 against both appellants, without any previous order of court fixing the compensation of the Auditor or charging it upon the parties herein, as required by Rule 53 (a) F.R.C.P., is without authority in law and should be set aside.

Respectfully submitted,

DONALD S. CARUTHERS

McLachlen Bank Building
700 Tenth Street, N. W.
Washington, D. C.

Attorney for Appellant,
Ronald L. Walutes, Trustee, et al

PAUL LEE SWEENY

406 Southern Building
Washington, D. C.

Attorney for Appellant,
Washington Concrete Sales, Corp.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,195

RONALD L. WALUTES,
Trustee of the Estate of the Alexandria Iron Works, Inc.,
a bankrupt,

and

WASHINGTON CONCRETE SALES CORP., INC.,
a corporation,

Appellants,

v.

ARTHUR E. MORRISSETTE
and
CLARA M. MORRISSETTE,

Appellees.

Appeal from the United States District Court
for the District of Columbia

MILTON M. BURKE
1010 Vermont Avenue, N. W.
Washington, D. C. 20005

Counsel for Appellees

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,195

RONALD L. WALUTES,
Trustee of the Estate of the Alexandria Iron Works, Inc.,
a bankrupt,

and

WASHINGTON CONCRETE SALES CORP., INC.,
a corporation,

Appellants,

v.

ARTHUR E. MORRISSETTE
and
CLARA M. MORRISSETTE,

Appellees.

Appeal from the United States District Court
for the District of Columbia

MILTON M. BURKE
1010 Vermont Avenue, N. W.
Washington, D. C. 20005

Counsel for Appellees

COUNTERSTATEMENT OF QUESTION PRESENTED

After the rendition of a final judgment in favor of Appellees in a suit brought to enforce mechanic's liens where reference had been made to the District Court Auditor and auditor's fees totalling $1,438.38 had been assessed against the prevailing Appellees, does the trial court have the power and discretion on a motion to assess such auditor's fees as taxable costs to include such auditor's fees paid or chargeable to Appellees as taxable costs?

INDEX

TABLE OF AUTHORITIES

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,195

RONALD L. WALUTES,
Trustee of the Estate of the Alexandria Iron Works, Inc.,
a bankrupt,

and

WASHINGTON CONCRETE SALES CORP., INC.,
a corporation,

Appellants,

v.

ARTHUR E. MORRISSETTE
and
CLARA M. MORRISSETTE,

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF CASE

This case commenced in August of 1956 when an action was brought by Alexandria Iron Works, Inc. to enforce a mechanic's

lien filed by it against Appellees' real estate in which action Appellant, Washington Concrete Sales Corp. was named as a defendant and filed a cross-claim against Appellees to enforce its mechanics' lien. On November 23, 1954, Appellees contracted with Master Guild, Inc., to construct a warehouse on their property at 821 Howard Road, S. E., in the District of Columbia. Master Guild, Inc. was subsequently defaulted on its contract which was completed by Appellees at a cost in excess of the balance due on its contract with Master Guild, Inc. Appellants were sub-contractors of Master Guild, Inc., to whom monies were due and owing at the time that Master Guild was defaulted and who filed mechanics' liens against the property of Appellees and this action resulted from their efforts to enforce such mechanics' liens.

The position taken by Appellants was, among other things, that there was a balance due to Master Guild, Inc., general contractors, in excess of the completion costs, and secondly, that Appellees were in violation of Sec. 38-107 of the District of Columbia Code, by reason whereof Appellants were entitled to judgment against Appellees for the monies due them from Master Guild, Inc. This case was then referred to the District Court Auditor and extensive hearings were held before such Auditor. As is customary in Auditor's hearings, anticipated costs are fixed and the Auditor designates how those costs are to be paid to him. The initial costs were fixed at $1,000.00 which the Auditor directed be paid in equal shares, one-half by Appellees and one-half in various proportions by the others. Appellees unsuccessfully petitioned the Court to alter this order. Appellees thereupon paid $500.00 of the total assessment of $1,000.00. A considerable time later, after the report of the Auditor had been filed, additional costs had been incurred and the Auditor assessed Appellees one-half of such additional costs amounting to $938.38, which was incorporated into the final order of the Auditor approved by the Court. Appellees thereupon became liable to pay and were charged with the additional sum of $938.38 for a total obligation of $1,438.38.

The principal case was eventually determined in favor of Appellees and such decision was confirmed by this Court.

A motion was thereupon filed by Appellees for assessment of costs (JA 4-5) requesting the Court to assess such portion of the Auditor's fees paid by them or chargeable to them, as costs in this case, which the trial court granted (JA 3). Appellees followed this with their own motion to vacate the order allowing the taxing of such costs which was denied (JA 21).

A notice of appeal from the Court's order of May 8, 1967 (JA 23) by Appellants followed.

RULES INVOLVED

Rule 53(a) of the Federal Rules of Civil Procedure.

Rule 54(d) of the Federal Rules of Civil Procedure.

Rule 17 of the United States District Court for the District of Columbia.

Rule 53(a) of the Federal Rules of Civil Procedure reads as follows:

> "(a) Appointment and compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word 'master' includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report

> as security for his compensation, but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

Rule 54(d) of the Federal Rules of Civil Procedure reads as follows:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . .Costs may be taxed by the clerk on one day's notice. On motion served within five days thereafter the action of the clerk may be reviewed by the court."

Rule 17 of the United States District Court for the District of Columbia reads as follows:

> "The Auditor or a Master may require the deposit of funds sufficient to defray the expense of a reference, including a stenographic report of the testimony".

POINT INVOLVED

After the determination of a case does the Trial Court have the power, in his discretion, to charge Auditor's fees as taxable costs in favor of the prevailing party?

SUMMARY OF ARGUMENT

A. Auditor's fees, in the discretion of the Trial Court, are taxable costs.

B. The mere fact that $500.00 of the Auditor's fees was paid at the time preliminary deposit was awarded and the balance had been assessed

against Appellees but had not as yet been paid does not preclude Appellees, as prevailing parties, from being awarded their share of the Auditor's fees as taxable costs.

C. Costs shall be allowed as of course to the prevailing party unless the Court otherwise directs.

ARGUMENT

A. AUDITOR'S FEES, IN THE DISCRETION OF THE TRIAL COURT, ARE TAXABLE COSTS.

Appellants incorrectly argue that the Trial Court was without power to tax as costs against Appellants the Auditor's fees and costs charged to Appellees. Appellants contend that the Auditor has the burden of seeking an award of compensation and costs from the Trial Court. However, it is well established that the Auditor's fees and costs are taxable costs under the Federal Rules of Civil Procedure, Rule 54(d):

> "Costs of reference properly may be considered as costs within the meaning of Rule 54(d). Expenses of this character were so considered in Ex Parte Peterson, 253 U.S. 300, 318, 319 40 S.Ct. 543, 549, 64 L.Ed. 191 cited by the use plaintiffs. There the costs of the Auditor were required to be paid by the losing party." *Dyker Bldg. Co. v. United States*, 86 U.S. App. D.C. 297 - 182 F2d 85.

The fact that the Auditor has preliminarily apportioned his fees and costs between the parties does not deprive the Trial Court of its powers to tax the Auditor's charges. Where there has been a general reference to a master (auditor in the instant case) and the party who ultimately prevails has been charged, in whole or in part, with the master's fees and expenses, he is entitled to tax this as costs against the losing party. *Raver v. Hatfield* 295 Fed. 48 (9th Cir. 1924) and see *Pallma v. Fox*, 182 F2d 902 (2nd Cir. 1950).

Appellants argue that Appellees had been ordered to pay $500.00 of the Auditor's costs by the Trial Court's Order of April 4, 1962 (JA 15), and had not appealed therefrom and therefore they contend the Trial Court was without power to tax the Auditor's costs against Appellants. The April 4, 1962 Order required the Appellees "to deposit with the Deputy Auditor as indemnity, double the reporting expenses to be incurred, the sum of $500.00. . ." This was in accordance with Rule 17 of the United States District Court for the District of Columbia, which provides, "The Auditor or Master may require the deposit of funds sufficient to defray the expenses of a reference, including a stenographic report of the testimony". It cannot properly be argued that the requirement of a security or indemnity deposit settled the question of who, ultimately, would be required to bear the costs. The finding of ultimate liability could not have been made prior to the judgment appealed from.

As pointed out herein before, the Auditor's fees and costs are taxable costs under Rule 54(d) of the Federal Rules of Civil Procedure, *Dyker Bldg. Co. v. United States, supra.* No cases have been found in this Court to support Appellants' contention that the Trial Court must go through a separate proceeding on the Auditor's Motion before assessing costs. *In Dyker Bldg. Co. v. United States, supra,* for example, this Court's opinion merely recites: "The judgment included costs, except that the costs of reference were ordered to be divided." (86 U.S. App. at 298).

Contrary to Appellants' contentions the Trial Court had approved the Auditor's fees and costs prior to the judgment appealed from. In the Trial Court's Order filed July 3, 1963 (JA 220), the total amount of the Auditor's fees and costs was approved. Significantly, the Trial Court rejected as a legal conclusion the last sentence of paragraph 33 of the Auditor's report (JA 193), which attempted to apportion the fees and

costs between the parties. The Trial Court specifically left open the assessment of the Auditor's fees and costs between the parties in its Order filed July 3, 1963. The apportionment was correctly made in the judgment appealed from.

B. THE MERE FACT THAT $500.00 OF THE AUDITOR'S FEES WAS PAID AT THE TIME PRELIMINARY DEPOSIT WAS AWARDED AND THE BALANCE HAD BEEN ASSESSED AGAINST APPELLEES BUT HAD NOT AS YET BEEN PAID DOES NOT PRECLUDE APPELLEES, AS PREVAILING PARTIES, FROM BEING AWARDED THEIR SHARE OF THE AUDITOR'S FEES AS TAXABLE COSTS.

Appellants contend that they were deprived of due process of law by the Trial Court's awarding Appellees $1,438.38, as additional costs because Appellees' Motion for Assessment of Costs (SJA 4-5) prayed, "for an order fixing the sum of Five Hundred($500.00) Dollars paid by them to the Auditor of this Court as part of the taxable costs . . ." However, the body of the motion makes it clear that Appellees were seeking assessment of the entire $1,438.38, Auditor's fees and costs and Appellants were in no way deprived of an opportunity to challenge the award of the total amount. Appellants' responsive pleadings to the Motion do not restrict themselves to consideration of $500.00 (SJA 6-13). To require a separate proceeding on the amount in excess of $500.00 would be to require a useless act unnecessarily consuming the time of the Court and the parties since the entire amount was taxable costs. Even an oral motion covering the additional amount could have been considered.

C. COSTS SHALL BE ALLOWED AS OF COURSE TO THE PREVAILING PARTY UNLESS THE COURT OTHERWISE DIRECTS.

The taxing of the Auditor's fees and costs against Appellants was in accordance with Rule 54(d) of the Federal Rules of Civil Procedure which provides: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs ..."

The phrase, "unless the court otherwise directs" gives discretion to the Court to disregard the general rule that costs are awarded to the successful litigant. Ordinarily, the Appeal Court will not disturb the Trial Court's award of costs although it will make a determination whether discretion has been abused. In *Association of Western Railways v. Riss & Company*, 116 U.S. App. D.C. 63, 68 (1963) it is stated:

> There remains for consideration the appellants' contention that the trial judge abused his discretion in refusing to allow them to recover their costs. As Chief Justice Taft said (*Newton v. Consolidated Gas Co.*, 265 U.S. 78, 82, 44 S.Ct. 481, 482, 68 L.Ed. 909 (1924), "There is no doubt that as a general rule, an appeal does not lie from a decree solely for costs. . ." This may be equally true as to a decree which declines to award costs. But when, as here, the power of the court is in dispute, an appeal may be entertained. It does not seem to us that discretion was abused here. Although the judge complimented the parties and their counsel on their behavior, he may well have thought them equally responsible for a long and arduous trial and that consequently, each side should bear its own costs.

In the instant case the Trial Court did not abuse its discretion in following the general rule that "costs shall be allowed as of course to the prevailing party." It is to be noted at this point the circumstances surrounding this case and its initiation and pursuit by Appellants for ten years. It placed an unreasonable and expensive burden upon Appellees through no fault of their own. Appellees had not engaged Appellants to do any work for them except as to one Appellant, who had been paid for a small job in connection with the completion of the construction. Their dealings were with the general contractor who defaulted on his contract. Appellants filed mechanics' liens and brought this action to enforce them, which involved extensive and costly hearings before the Auditor and eventually proved that Appellees were unjustly sued. In addition to the Auditor's

fees, Appellees were caused to incur the heavy expenses of litigation and the cost of bond premiums to bond off their property against the mechanics' liens as well as the tremendous loss of time and money in the hearings, and the litigation, and suffered the inconvenience resulting from the cloud against their financial reputation. It is conceivable that all of these things were taken into consideration by the Trial Court in impelling the Trial Court to follow the general rule and impose the costs of the Auditor's fees as taxable costs against the losing party.

In the case primarily relied upon by the Appellants, *Tendler v. Jaffe*, 92 U.S. App. D.C., 2, 203 F.2d 14, this Court disturbed the Trial Court's award of Auditor's fees and costs under the particular circumstances of that case: The result of the reference reflected in the record of the hearings sufficiently supports the exercise of the Court's discretion to refrain this Court from disturbing the reference, though we conclude its costs, in the circumstances, should be borne equally by the parties rather than entirely by Appellant. See *United States v. E. J. Biggs Construction Co.*, 7 Cr. 1940, 116 F.2d 768, 775, where, under the special facts of the case the Appellate Court required a division of such costs different from that specified by the District Court.

This Court defined some of the guide-lines for evaluating the Trial Court's exercise of discretion in taxing Auditor's fees and costs as costs, in *Dyker Bldg. Co. v. United States, supra*:

> Rule 54(d) of the Federal Rules of Civil Procedure provides: "*Costs.* Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."
>
> In our opinion this rule applies to the present situation. We are cited to and can find no statute or rule to the contrary. Under the above provision costs should be allowed the use plaintiffs as the

> prevailing party unless the court otherwise directs. Costs of reference properly may be considered as costs within the meaning of Rule 54(d). Expenses of this character were so considered in Ex Parte Peterson, 1919, 253 U.S. 300, 318, 319, 40 S.Ct. 543, 549, 64 L.Ed. 919 cited by the use plaintiffs. There, the costs of the auditor were required to be paid by the losing party, in accordance with what was stated to be the proper rule "except in those few cases where by express statutory provision or by established principles costs are denied." Rule 54(d), however, now permits the court otherwise and to relieve the losing party of the full burden. The District Court has directed a division as recommended by the special master. We have no reason to hold that this was not a permissible exercise of discretion. The special master was appointed at the request of the use plaintiffs and with the consent of the Building Company. No doubt there were advantages to both sides in being allowed to develop the case at a more leisurely pace than a trial in court would have permitted. Furthermore, the amount sued for was substantially less than the award. (sic). Though they prevailed, the use plaintiffs did not prevail entirely. This is not controlling but it is an element which with the others mentioned, enters into the propriety of the discretion which was exercised. See *Blassengame v. Boyd*, 4 Cir., 1910, 178 F. 1, 4.

Under the foregoing guide-lines in the light of the earlier disposition of this case on its merits in which the Trial Court, subsequently confirmed by this Court, found for Appellees that Appellants from the beginning had no claim against Appellees for any reason, it appears eminently unfair to burden Appellees not only with eleven years of unfounded litigation involving many weeks of hearings, exceptional loss of time and large expenses incident to litigation such as attorney fees, bond premiums, etc., to add to these Auditor's fees amounting to $1,438.38. A mere vindication of Appellees should not excuse Appellants from paying, in the least, all of the actual Court Costs, including Auditor's fees, expended in litigation which Appellees neither asked for, wanted, or needed.

CONCLUSION

It is respectfully submitted by Appellees that the estimated Auditor's fees paid or chargeable to Appellees could not have been taxed as costs until final determination of the suit on its merits, at which time and because assessment of Auditor's fees and costs as taxable costs is discretionary with the Trial Court, such fees as costs could only then have been determined by the Court on Motion, as was done in this case. The Trial Court was without error and acted in the proper exercise of its discretion in awarding Appellees, the prevailing party, judgment for costs and in including that share of the Auditor's fees and costs which had either been paid or been charged to the Appellees as taxable costs.

Respectfully submitted,

MILTON M. BURKE

1010 Vermont Ave., N. W.
Washington, D.C. 20005

Attorney for Appellees